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IN THE

Supreme Court of the United States

October Term, 1957.

No. 391

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS AND BADHWAR,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

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OCTOBER TERM, 1957.

No.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, Ltd., composing the co-partnership doing business under the firm name and style of Mulkraj Brothers and Badhwar,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review that part of a judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on May 29, 1957, which affirmed that part of a decision of the United States District Court for the Southern District of New York dismissing on the merits petitioners' action against The Colorado Fuel and Iron Corporation, respondent.

Citations to Opinions Below.

The opinion of the District Court (4a-41a)[1] is reported at 138 Fed Supp. 595. In the Court of Appeals for the Second Circuit, the opinion of the Court was written by Chief Judge Charles E. Clark for himself and Judge J. Edward Lumbard, and a dissenting opinion was written by Judge Learned Hand, who voted to reverse the judgment of the District Court and to remand to ascertain damages. Said opinions are printed as Appendix A. (*Infra*, p. 23.)

Jurisdiction.

The judgment of the United States Court of Appeals was dated and entered on May 29, 1957, and is printed as Appendix B. (*Infra*, p. 32.) The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

Questions Presented.

1. The majority opinion of the Court of Appeals begins with the following statement:

> "This appeal presents interesting issues concerning the duty of an American seller under a C. I. F. contract to select a suitable ship to carry goods to a foreign buyer on the eve of an impending strike." (P. 24, *infra*.)

(a) What is the effect (upon such seller's duty to select a suitable ship) of a national emergency 80-day injunction against a general maritime strike? During such injunction period may such seller contract with a buyer in India to sell and ship him goods without disclosing to him the strike threat to performance of the contract, or re-

[1] Figures in parentheses refer to pages of the printed Appendix to Plaintiffs-Appellants' Brief in the United States Court of Appeals.

vealing the tentative shipping arrangements with the ocean carrier, or bargaining for and obtaining an exculpatory clause in the contract, and nevertheless escape liability for delay caused by the strike?

(b) Where the seller has made a contract of affreightment with a carrier during such strike injunction period and *prior* to seeking out and contracting with the foreign buyer to sell and ship him the goods, and fails to disclose to the buyer the terms or infirmities of such contract of affreightment, can the latter contract be deemed to have been made "on behalf of the buyer" as required by the Uniform Sales Act, so as to bind the buyer to its infirmities?

(c) May such seller modify such contract of affreightment, without notice to the foreign buyer, so as to accept a ship subject to immobilization by such strike, and scheduled to sail after the expiration of the strike injunction, and may he proceed to load the goods thereon, despite the foreseeable risk of delay in movement thereof, without assuming such risk?

2. (a) Whether such seller, having unilaterally elected "to take a chance that the (vessel) would not be struck or would be struck briefly" (majority opinion, p. 28, *infra*), although the duration of the strike could not be foretold by anyone, is relieved of his gamble when the strike continues far beyond the seller's final dates for proper shipment under the contract.

(b) Whether such majority holding, over the vigorous dissent of Judge Hand, conflicts with a basic principle of contract law with respect to foreseeable risks, long settled in this Supreme Court and in the Court of Appeals of the State of New York, and followed by the Court of Appeals for the Second Circuit in its previous decisions.

3. Where a contract specifies shipment of goods, part by September 22nd and part by October 10th, may a Court alter such terms by its own purely speculative assumption that the buyer "would accept an October 11th sailing if necessary" (p. 28, *infra*), for *all* of the goods? Does not this holding exceed the lower Court's competency as defined by this Court and does it not dangerously unsettle basic contract law in New York and elsewhere?

4. (a) Has the Court below, in dealing with the question of fraudulent negotiation of bills of lading, negated the New York law of "good faith" in the performance of contracts and disturbed such law in other states?

(b) Has it likewise rendered ineffectual 49 U. S. C., Section 114 (c), which states that one negotiating a bill of lading warrants "that he has knowledge of no fact which would impair the validity or worth of the bill"?

5. Whether a freight forwarder is an independent contractor to whom a seller can delegate his duty of shipment without further responsibility to a buyer and achieve isolation from facts known to the freight forwarder. Whether he achieves the same result by delegating only the duty of obtaining a bill of lading.

6. Whether a freight forwarder deputed to select a ship may leave its selection all together to an interested carrier, or whether that constitutes, as Judge Hand declares, "an irresponsible subinfeudation of authority" (p. 31, *infra*).

7. Whether the Court below has dignified local trade practices with a dangerously binding and conclusive effect that would preclude Courts from inquiring as to their adequacy, scope, necessity, freedom from negligence and familiarity to foreign buyers.

Statutes Involved.

The statutes involved are the Labor Management Relations Act of 1947, §§ 209, 210, 61 Stat. §§ 155, 156, 29 U. S. C., §§ 179, 180; the United States Carriage of Goods by Sea Act, April 16, 1936, C. 229, § 4, 49 Stat. 1210, 46 U. S. C., § 1304 (2) (j); the Act of August 29, 1916, C. 415 (Bills of Lading) § 34, 39 Stat. § 543, 49 U. S. C., § 114, (a), (b), (c); and the New York Personal Property Law, §§ 127 and 100 (5), which are identical with the Uniform Sales Act, §§ 46 and 19 (5), 1 Uniform Laws Annotated. These statutes are printed in Appendix C (p. 34, *infra*).

Statement.

The action is for substantial money damages sustained by a buyer of caustic soda chiefly through market decline, due to the failure of the seller, the defendant-respondent, to make proper and timely shipment thereof. The soda arrived in Bombay some six months after its loading aboard the S. S. *Hawaiian* at New Orleans. Plaintiffs-appellants are citizens and residents of Lucknow, India. The defendant-respondent, The Colorado Fuel and Iron Corporation, is a corporation organized in Colorado. In the lower courts, two other defendants were included, against whom no writ is sought, namely American-Hawaiian Steamship Company, owner of the S. S. *Hawaiian*, an Isbrandtsen Company, Inc., charterer thereof. The District Court found complete diversity and jurisdiction under 28 U. S. C. 1332 (a) (2).

The delay complained of, which gave rise to plaintiffs' damages, resulted from a strike of the unionized crew of the S. S. *Hawaiian*, which interrupted her loading and immobilized her for more than three months. It was not a localized strike, a "wildcat" strike, nor

at all sudden, but was announced long before Colorado initiated negotiations for a sales contract with plaintiffs, and went into effect on schedule when the statutory injunction against it expired. As the District Court opinion states (10a):

> "On June 14th, 1948, a threatened maritime strike on the East, Gulf and West coasts was temporarily restrained, and subsequently enjoined for a full eighty-day period expiring September 2nd, 1948. Orders were made by this Court and the United States District Court for the Northern District of California pursuant to the 'national emergency' provisions of the Labor Management Relations Act of 1947. Separate actions were filed on behalf of the United States against various maritime unions and ship operators, including Isbrandtsen and American-Hawaiian. * * *"

On July 29, 1948, or 46 days after the strike injunction commenced running, Colorado entered into an affreightment contract, or "booking," with Isbrandtsen, calling for the carriage of 1,000 tons of caustic soda from New Orleans to Bombay on the S. S. *Jane G. Swisshelm* or other A-1 vessel. Shipside delivery was to be made between August 19 and 25, as required by Isbrandtsen's agents. The scheduled sailing date of the vessel was August 28-30 (C. A. Op., p. 25, *infra* [Col. Appx., 51a]).

Thereafter, early in August, 1948, Colorado urgently requested the National City Bank of New York to find a buyer in India for its caustic soda (42a, 45a), and the bank found plaintiffs, who agreed to take 2,000 tons at a flat price of 9 1/2 cents per pound, C.I.F. Bombay, giving no consideration to an F.A.S. alternative offer.[2]

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[2] Most of the relevant cables and correspondence are reproduced or summarized in the District Court Opinion (5a-9a), but a few not fully, which latter are printed in the Appendix to Plaintiffs-Appellants' Brief (42a-50a).

Colorado had first ascertained from the bank that the market trend was downward and speculative elements in India were selling (42a, 45a). New York law was applied to the construction of the contract by agreement of the parties (5a).

With respect to shipment, Colorado represented, by cable of August 6, 1948, that it had shipping space for a minimum of 500 tons of caustic soda "from New Orleans" on or about August 22, 1948, and undertook to arrange shipment of the balance "from a Gulf Port" by September 20, 1948 (6a, 7a). It further represented, by cable of August 10, 1948, that it had an "option on boat space expiring Friday" August 13, 1948—a non-existent option, unexplained at the trial (Pl. Exh. 1, Sched. P., 46a). It further stated, by cable of August 12, 1948, that it hoped to load 1,000 tons on the "steamer Jane G. Swisshelm leaving New Orleans about August 23" (8a, 9a). Plaintiffs' first letter of credit was issued to Colorado August 19, 1948, and was in a sufficient amount to pay for the 1,000 tons. On August 26, 1948, Colorado cabled:

> "If shipment on the balance of $186,600 is to go out on present steamer must have completed credit arrangements immediately." (Pl. Exh. 1, Sched. AD, 46a, italics supplied.)

The credit arrangements were completed on the same day. However, the credits established by the plaintiffs (Appx. to Colorado Br. in C. A., pp. 39a, 41a), merely called for on board ocean bills of lading which might be of later date, evidencing shipment of caustic soda from *any* U. S. ports to Bombay in one or more shipments, and the District Court concluded that they extended the permissible shipping dates accordingly. Thus Colorado had the option of loading part of the soda on one or more properly selected vessels at any U. S. port

as late as September 22, 1948, and the remainder as late as October 10, 1948 (D. C. Op., 9a; C. A. Op., pp. 24, 27; *infra*).

The "booking" with Isbrandtsen for 1,000 tons on the S. S. *Jane G. Swisshelm* or other A-1 vessel had been obtained for Colorado by Farrell Shipping Co., its permanent sole freight forwarders at New Orleans, and specifically by the witness Becker, an officer thereof. Becker, on direct examination by Colorado's counsel, testified that he knew there would be a substitution for the *Swisshelm* "either at the time of the first booking or shortly thereafter" (61a). The exact vessel was not then known, but on August 17th, Isbrandtsen chartered the S. S. *Hawaiian* and the substitution thereof was on that day confirmed by Becker and the Colorado traffic department. In so doing, Colorado accepted a sailing date subsequent to the impending termination of the strike injunction, a critical factor not present in its previous arrangements regarding the Swisshelm. The scheduled sailing date of the Swisshelm had been August 28th-30th (12a). On August 19th, at Colorado's request, the caustic soda booking for the S. S. *Hawaiian* was verbally increased to 1,500 tons, with latest shipside delivery at New Orleans by September 2nd, 1948 (12a, 13a), the very day the maritime strike was to be resumed, absent an intervening settlement.

Plaintiffs-petitioners had no knowledge of the enjoined U. S. maritime strike (54a, 55a), and were given none by Colorado during the many exchanges. Moreover, they were never notified of the true terms made by Colorado for the *Swisshelm*, nor of the substittuion of the *Hawaiian* for the *Swisshelm*, nor of the deferred sailing date, so that under no circumstances could they be charged with notice of the shipping arrangements made unilaterally by Colorado.

Becker testified that when negotiating with Isbrandtsen for the *Swisshelm*, he had ascertained that she was under bareboat charter to Isbrandtsen (61a). But when he confirmed the substitution of the *Hawaiian*, he did not inquire as to her charter status, nor did Colorado's traffic department. He never admitted knowing who owned the *Hawaiian* or what type of charter existed. He maintained it was of no concern to him as he was dealing with shipping people in whom he had confidence (68a). He knew the difference between a bareboat charter and a time charter and he admitted that the fact that he was dealing with Isbrandtsen did not necessarily mean to him that Isbrandtsen was going to operate the vessel (70a). The question was then put by plaintiff's counsel (71a):

> "Q. So when you say you had no reason to wonder whether this strike you read about was going to affect this vessel, are you basing that on the fact that you did not know that American-Hawaiian was the owner of this vessel? A. I could base it on that fact, plus the fact that I did not know what type of charter was involved."

Incidentally, a later witness, Vice-President Crinkley of Isbrandtsen, testified that of some 60-80 vessels utilized by Isbrandtsen, at that time, only about ten were owned by it and the rest chartered (119a). It had no regular service from New Orleans or any Gulf ports to Indian or adjacent ports (118a, 120a). Isbrandtsen had booked this caustic soda as the nucleus of a cargo to be assembled (74a). There were regular lines which had no freight room at the time. (73a, 74a).

Significant also is Becker's admission that his conception of his duty was to obtain an ocean bill of lading and he would not be concerned with when or how the vessel would leave port unless his shipper instructed him, which Colorado did not do in this case (69a). He also testified that Colorado's traffic department usually

told him what ship to use on its steel shipments out of New Orleans (73a).

Becker also testified that from reading the New Orleans press reports, which are in evidence (Pl. Exh. 4, in part, 76a-92a), he formed the opinion about August 18, 1948, that there would be no strike at New Orleans (65a). These press reports show that, while the east and Gulf coast disputes were settled August 18, the west coast situation was not. An Associated Press dispatch carried on August 30th, before loading of the caustic soda began, reported an atmosphere of more than usual antagonism, in which a spokesman for the West Coast unions reaffirmed that their strike called for September 2nd, when the 80-day injunction would expire, would come off on schedule (85a). This announcement was reiterated in the press of August 31st (87a). The press of September 1st reported a planned railroad embargo of West Coast ports to prevent tie-up of freight cars, and that prospects of settlement between the operators and the five unions appeared slim (88a, 89a). At best, Becker had erroneously concluded that the East Coast settlements applied to a ship which he had neglected to ascertain was owned by a West Coast operator and crewed by a different set of unions having their strike negotiations on the West Coast.

The *Hawaiian* docked at New Orleans on August 31st, shortly after noon. At one P. M., on the same day, loading of the caustic soda commenced and was continued on September 1st, including overtime from 5 P. M. to 6 P. M. and on September 2nd, when it commenced an hour early, at 7 A. M. On September 2nd, the expired strike injunction was lifted at 10 A. M. by order of the District Court at San Francisco and the walkouts, which had commenced at midnight, September 1st, spread to all Pacific Coast ports (90a, 91a). At New Orleans only the *Hawaiian* and one other vessel were affected and rendered strikebound (D. C. Op., 19a).

The District Court found that all of the 1,490 tons of caustic soda with which the *Hawaiian* eventually sailed was loaded by 6 P. M., on September 2nd (15a). It further found (15a, 16a):

> "The smooth deck log of the Hawaiian shows that at three P. M. on September 2nd, the stewards' department left the ship to attend a union meeting and did not return to the ship until three A. M. on September 3rd, when they returned to remove their personal effects. At 3:15 A. M. on September 3rd, 1948, the stewards of the ship went ashore and were 'definitely on strike.' The loading of the cargo continued throughout the remainder of that night and until 10 A. M. in the morning. The engine room crew ceased working at that time, struck the vessel and refused to supply the steam necessary to drive the ship's winches so that cargo should be loaded."

Isbrandtsen thereupon declared the ship off hire and American-Hawaiian had her towed to anchorage where she remained strikebound and unable to be loaded or unloaded until December 9th, when the strike was settled. She remanned, refueled, went back on hire, resumed loading operations December 13th, and sailed from New Orleans December 19th, ultimately arriving at Bombay February 28, 1949 (27a, Ftnte. 92).

The District Court found that the bills of lading were issued by Isbrandtsen's agents to Colorado's agents at the latters' request on September 3rd at 9:30 A. M. (17a), and that they were mailed to Colorado at Denver on Friday, September 3rd. Monday, September 6th, was Labor Day (66a). On September 7th, Becker wired Colorado's traffic department about the strike delaying the *Hawaiian* (Col. Appx., 61a). Colorado wrote Becker September 10th for further details and Becker's answering letter was dated September 13th (Col. Appx., 60a-62a). In the meantime Colorado proceeded with the business

of negotiating the bills of lading. Sight drafts, accompanied by the bills of lading were presented to the bank at New York "on or about September 7, 1948" and each "was thereafter honored by said bank by the payment to The Colorado Fuel and Iron Corporation on or about September 13, 1948" of the sums called for (Stip., Col. Appx., 33a-35a). On September 20th, Colorado's New York office wrote plaintiffs-petitioners of the strike delay to the *Hawaiian*. The balance of the order was cancelled by an exchange of cables (48a).

Reasons Why the Writ Should be Granted.

A. An Important Question of Federal Law Remains to be Settled.

The opinions of the Courts below only compound the confusion in which the commercial world must operate during the 80-day injunctive period afforded to the president and the Federal Courts to restrain a maritime strike of national emergency proportions. Prior to the passage of the injunctive legislation, Congress had expressly exempted ocean carriers from loss or damage resulting from strikes or lockouts (46 U. S. C. A., § 1304 (2) (j); p.. 35, *infra;* cf. D. C. Op. 26a). Thus a shipper deals with a carrier in awareness of such exemption. No legislation protects the shipper. A manufacturer or seller of merchandise protects himself against strike interference with performance of his contract by bargaining for and obtaining an exculpatory strike clause and, in the absence thereof, non-performance or delay is not excused. *Normandie Shirt Co., Inc., v. C. K. Eagle,* 238 N. Y. 218, 144 N. E. 507, and authorities cited therein.

An exculpatory strike clause is strictly construed by the New York Court of Appeals. *William C. Atwater &*

Co., Inc., v. Panama R. Co., 255 N. Y. 496, 175 N. E. 189. In the absence of agreement a marine strike does not excuse non-delivery of goods. *Id., Companhia de Navigacao Lloyd Brasileiro v. C. G. Blake Co.*, 2nd Cir., 34 F. 2d 616.

Herein the District Court, while remarking that contractual strike clauses are "to be encouraged" (24a), not only refuses to make the rule absolute but evicts it entirely from the area of maritime strikes. The ultimate rationale of the District Court's decision is that all maritime strikes are unpredictable, especially in duration (23a), and the loss should remain where it happens to fall (25a). It lumps all strikes together, national emergency strikes with local waterfront disturbances (23a), despite the fact that Congress has charged the President and the federal Courts with the predictability of a national emergency strike and they have exercised their function so that all prospective shippers may know when such strike impends.

This refusal to apply to the situation the normal principles of contract law *would create a vacuum in the law on this subject,* a hands-off policy on the part of the courts which ill befits the realities of our highly unionized society.

Judge Hand, in his dissenting opinion in the Court of Appeals, suggests a workable distinction between strikes arising "unexpectedly after the contract of sale was made" and a situation such as ours (p. 30, *infra*). The majority opinion, however, makes confusion thrice compounded by misapplying contract law and rejecting its own prior decisions, as we shall see.

B. Conflicts between the Second Circuit on the One Hand and the United States Supreme Court and the New York Court of Appeals on the Other.

1. *Basic Contract Law.*

Realizing that the strike which immobilized the S. S. *Hawaiian* was fully foreseeable and predictable but its duration was not, the Court below would allow the shipper to put the goods aboard and take a chance "that it would be a brief strike" (p. 28, *infra*). Thus, he may take the chance but not assume the risk that it would be a long strike.

This Court has long since dealt with the subject of foreseeable risks overhanging the performance of a contract. If such a risk was within the contemplation of the promisor, it does not matter that it eventually caused damage in an unusual way, unpredictable in detail. *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 429, 25 S. Ct. 84, 49 L. Ed. 269. Nor does it matter that the nature and extent of the damage be far beyond the promisor's expectation. *Day v. U. S.*, 245 U. S. 159; 38 S. Ct. 57, 62 L. Ed. 219. "The answer to the objection of hardship in all such cases is that it might have been guarded against by proper stipulation." *The Harriman*, 76 U. S. 161, 173; 19 L. Ed. 629; *Carnegie Steel Co. v. U. S.*, 240 U. S. 156, 165, 36 S. Ct. 342, 60 L. Ed. 576; *Sun Printing Co. v. Moore*, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

In *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 253 N. Y. 194, 179 N. E. 383, it was held that a middleman must have disclosed to his customer the infirmities of his arrangements with his supplier and have obtained an exculpatory clause to escape liability. The New York Court of Appeals stated (Cardozo, C. J.):

"So far as the record shows, it (defendant) puts its faith in the mere chance that the output of the refinery would be the same from year to year, and finding its faith vain, it tells us that its customer must have expected to take a chance as great. We see no reason for importing into the bargain this aleatory eleme t" (at p. 199, citing *Day v. U. S.* and *Northern Pacific Ry. Co. v. American Trading Co., supra*).

It is settled in New York that, where the risk is foreseeable, and not guarded against in the contract, the promisor takes responsibility for a bad outcome, however optomistic his expectations. *Raner v. Goldberg*, 244 N. Y. 438, 155 N. E. 734; *Farlou Realty Corp. v. Woodsam Associates, Inc.*, 49 N. Y. Supp. 367, aff'd 268 App. Div. 975, aff'd 294 N. Y. 846, 64 N. E. 2d 396; *119 5th Avenue, Inc., v. Taiyo Trading Co., Inc.*, 73 N. Y. Supp. 2d 774, 776; *Kramer v. Uchitelle, Inc.*, 288 N. C. 467, 472, 43 N. E. 2d 493, 495, 141 A. L. R. 1497; *Robitzek Investing Co., Inc., v. Colonial Beacon Oil Co.*, 265 App. Div. 749, 753, 40 N. Y. S. 2d 819, 822; *Id.*, 291 N. Y. 831, 50 N. E. 2d 555; Williston on Contracts, Rev. Ed., §§1938, 1939, 1955; Restatement, Contracts, §§288, 458.

The majority opinion of the Court of Appeals, in allowing the seller to gamble on a short strike, has also extended the final shipping date under the contract. In so doing, it violates an elementary principle of contract law in such manner as to make the decision a potential source of great mischief. The two letters of credit (Col. Appx. 39a-42a) were in the respective sums of $239,000 and $186,600. Colorado drew $212,743.67 on the one and $104,631.86 on the other (Col. Appx. pp. 33a, 35a). By making one shipment only and drawing on both letters of credit, Colorado obviously accepted the earlier of the two shipping dates in the letters of credit, September 22nd, rather than the later date, October 10th (Cf. D. C. Op. 9a).

Colorado could not unilaterally extend a letter of credit nor can the Court of Appeals vary the terms of a contract. (*The Harriman, supra.*) Having done so, however, the Court goes on to measure the seller's performance against these varied terms, holding (p. 28, *infra*):

> "• • • the seller could nevertheless reasonably entertain the belief in good faith at the time of loading that the vessel would depart by the second week in October. The duty defined in *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297, was accordingly satisfied."

This error affects the application of the Court's own theory of permissible chance-taking so materially as to call for a reversal on that ground alone.

2. *Application to the Law of Shipment.*

The Court then remarks that the buyer could have done no more to speed the goods on their way had it been present and representing its own interests. Could it not have sought a ship at another port at greater expense to Colorado? Could not the contract have simply been cancelled with respect to these 1490 tons as was done with the remaining 510 tons? There was no categorial necessity for Colorado to make its profit by shipment, especially in a market it knew to be declining.

The Court continues in the same vein of error, always on the assumption that the seller must ship and if he cannot make normal and proper arrangements he may make do with whatever is available. This is not the New York law. Cf. Dissenting Op. p. 30, *infra*; *Miller v. Harvey*, 221 N. Y. 54; *Eppens v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13. The Second Circuit has previously agreed with *Eppens v. Littlejohn* so that it appeared to be settled

that inability to find a ship suitable to the cargo, difficult through it be, with room to stow it properly and not subject to abnormal delays, did not excuse the seller from either non-performance or delayed performance. *Companhia De Navigacao Lloyd Brasileiro v. C. G. Blake Co.*, 2nd Cir., 34 F. 2d 616; *Madereinse Do Brasil S/A v. Stulman-Emerick Lumber Co.*, 2 Cir., 147 F. 2d 399, Cert. De. 325 U. S. 861, 65 S. Ct. 1201, 89 L. Ed. 1982. The recognized exception is a supervening cause of an unexpected or catastrophic nature, such as the attack on Pearl Harbor and our consequent entrance into a war previously confined to the European nations. *L. N. Jackson & Co., Inc., v. Royal Norwegian Government*, 2nd Cir., 172 F. (2d) 694.

Admitting that Colorado could escape liability for non-delivery only if the catastrophe which prevented performance was not foreseeable, the Court in its last paragraph holds that it was never necessary for the seller to establish the impossibility of its performance because the plaintiffs failed to satisfy the Trial Court that the seller breached its contract. As Judge Hand points out, with many citations, this was merely a conclusion of law and not a finding of fact of the Trial Judge. This deprives the point of virtue even as a technicality. The issue of foreseeability of the strike was a central one at the trial and all that Colorado could prove it did prove thereon, as is evident from both the lower court opinions. The reasoning is circuitous. Whether the Court intends to make a new and unwarranted distinction between non-delivery and delay cases is not clear. The cases cited in this section of this petition show no distinction of that nature and no difference in the duty of selection of a vessel for shipment whether the sales contract have a C. I. F. term or not.

The cases we have cited grant no legal concessions to a seller who undertakes to sell and ship a difficult cargo for a price against foreseeable obstacles. The nature of the cargo points up the shipping problems he has assumed. Here Colorado had made no arrangements whatever to ship the balance of the 2000 tons it agreed to sell plaintiffs and obviously took the risk of not being able to perform its contract at all.

For commercial purposes, the buyer may expect the arrival of the goods in the length of time after loading thereof that an ordinary departure and an ordinary voyage would take, accident and perils of the sea excepted. *Lamborn v. Log Cabin Products Co.*, D. C. Minn., 1923, 291 Fed. 435; *Armour Grain Co. v. Compagnie Generale Trans-Atlantique*, 26 F. 2d 739, affd. 26 F. 2d 741; *Tobias v. Lissberger*, 105 N. Y. 404; *Connell Bass Co. v. Diederickseu & Co.*, 9th Cir., 213 Fed. 737; *Commercial Union v. Anglo-South Amer. Bank Ltd.*, 2nd Cir., 16 F. 2d 979.

3. *Conflict With the New York Law of Good Faith.*

The finding is that Colorado's agent Becker, had actual knowledge on September 3rd that the S. S. *Hawaiian* was strikebound and communicated such knowledge to Colorado September 7th, not necessarily prior to its presentation of the bills of lading and supporting documents to the bank on September 7th for negotiation against the letters of credit. Ignoring the fact that the formalities took until September 13th, when checks were issued to Colorado, the Court holds that Colorado did not have actual knowledge at the time of negotiations and that actual rather than constructive knowledge is required (p. 29, *infra*).

This conflicts with the New York law. Whatever is notice enough to excite attention, and put a party upon his guard and call for inquiry, is notice of everything to

which such inquiry might have led. Failure to investigate will not absolve one from imputed knowledge of all the investigation might have disclosed. *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597; *Fidelity & Deposit Co. v. Queens County Trust Co.*, 226 N. Y. 225, rvrsg. 174 App. Div. 160, 159 N. Y. Supp. 954; rearg. den., 226 N. Y. 711; *First National Bank of Paterson v. National Broadway Bank*, 156 N. Y. 459; *Application of Reinhardt*, Surr. Ct., Kings Co., 202 Misc. 424, 114 N. Y. S. 2d 208; *Skinner v. Norman*, 165 N. Y. 565.

In fact, one who fails to see the obvious or to investigate the doubtful may be held liable for fraud and deceit, even where there is lacking deliberate or active fraud. *Kramer v. Joseph P. Day, Inc.*, 26 N. Y. S. 2d 734; *State Street Trust Co. v. Ernst*, 278 N. Y. 104, 112.

C. The Second Circuit's Interpretation of a Federal Statute Should be Reviewed.

In the same discussion the Court below extends its requirement of actual knowledge to the statute, 49 U. S. C. 114 (c), which states that one negotiating a bill of lading warrants "That he has knowledge of no fact which would impair the • • • worth of the bill." Obviously the worth of the bills was impaired when the vessel was strikebound and the market declining and the bills could be further negotiated, at their value absent the strike, only by perpetrating a similar fraudulent concealment on an innocent third party. They were negotiated at New York, where the law of "good faith" makes constructive knowledge applicable, in accord with the law elsewhere. Moreover, the Court has seen fit to repudiate its salutary dictum in *Ocean S. S. Co. v. U. S. Steel Products Co.*, 2 Cir., 239 F. 823, 826; cert. den. 244 U. S. 652; and constrict the healthy principles of *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 2nd Cir., 27 F. 2d 129.

D. The Status of a Freight Forwarder and the Nature of His Trade Practices Require Review.

The Court below held in *L. N. Jackson & Co. v. Royal Norwegian Government*, 2nd Cir., 177 F. 2d 694, that a shipping agent was charged with inquiring and knowing whether a foreign vessel had registered under the U. S. Ship Warrants System in effect during World War II and imputed the knowledge not only to the agent but to his principal. Here it declines to impute even the agent's actual knowledge to the principal (p. 29, *infra*), a clear reversal.

It allows the seller's duty to the buyer to be delegated to an agent even against a showing that the agent was not informed of the sales contract or the duty thereunder.

It accepts the agent's uncertain concept of his duty to shippers as ending when he delivered bills of lading, without requiring the shipper to take over from there.

Assuming the agent was adequately deputed to select a ship during the strike injunctive period, the Court allows him to leave the selection altogether to an interested carrier free of strike responsibility, which Judge Hand denounces as an "irresponsible subinfeudation of authority."

Both Courts below have given undue weight to a local so-called trade practice of non-inquiry, indulged by a freight forwarder and his friends, the agents of a carrier from whom he also receives commission. It likewise honors his concept of his duty as limited to obtaining a bill of lading as being an apparent personal trade practice. It also honors the trade practice of the carriers to continue booking cargo in the face of an impending strike. That may well be the practice that best befits their business, free as it is from strike responsibility. Their stock

"optimism" is a necessary public attitude to induce business at such times and is part of the "trade practice." None of this can determine the rights of a buyer and seller.

Actually, no trade practice is applicable to this case because it was the first time a Taft-Hartley enjoined strike situation arose. New legislation invalidates old trade practices in any industry. A new situation requires reasonable new measures. *The T. J. Hooper*, 2nd Cir., 60 F. 2d 737. A trade practice whereby a shipper relies on a carrier who does not accept the responsibility and considers it the shipper's own problem, is a worthless practice leaving a vacuum of responsibility to the innocent consignee. This is not a matter which should be left obscure and only the highest court can effectively deal with it.

E. The Issues Herein are of Primary Importance to Domestic Commerce and International Trade.

Such importance is self-evident. Moreover, the decision of the Court below unsettles various sound legal concepts, creating new potential sources of doubt and litigation.

CONCLUSION.

WHEREFORE, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

DUNN & ZUCKERMAN,
Attorneys for Petitioner.

JAMES F. DUNN,
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Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 328—October Term, 1956.

(Argued April 5, 1957 Decided May 29, 1957.)

Docket No. 24016.

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, Ltd., a copartnership d.b.a. Mulkraj Brothers and Badhwar,

Plaintiffs,

v.

THE COLORADO FUEL AND IRON CORPORATION, ISBRANDTSEN COMPANY, Inc., and AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Defendants.

Before:

CLARK, Chief Judge, and
HAND and LUMBARD, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, Judge.

Plaintiffs, a partnership of Lucknow, India, appeal from a decision, D. C. S. D. N. Y., 138 F. Supp. 595, dismissing on the merits their action for damages for the delayed delivery, because of a strike, of a shipment of caustic soda from New Orleans to Bombay, brought against the seller, the carrier, and the owner of the vessel upon which shipment was made. Affirmed.

James F. Dunn, of Dunn & Zuckerman, New York City, for plaintiffs.

Francis S. Bensel, of Kelley, Drye, Newhall & Maginnes, New York City (W. Frederick Knecht, of Kelley, Drye, Newhall & Maginnes, New York City, on the brief), for defendant The Colorado Fuel and Iron Corporation.

Woodson D. Scott, of Lord, Day & Lord, New York City, for defendant Isbrandtsen Company, Inc.

Edward J. Heine, Jr. (L. DeGrove Potter, of Kirlin, Campbell & Keating, New York City, on the brief), for defendant American-Hawaiian Steamship Company.

Clark, Chief Judge:

This appeal presents interesting issues concerning the duty of an American seller under a C. I. F. contract to select a suitable ship to carry goods to a foreign buyer on the eve of an impending strike. The facts are fully stated in the reasoned opinion of the district court, D. C. S. D. N. Y., 138 F. Supp. 595; and so we shall limit ourselves to a summary statement. In early August, 1948, The Colorado Fuel and Iron Corporation agreed to sell the plaintiffs 2,000 tons of caustic soda C. I. F. Bombay. Part of this merchandise was to be shipped from a Gulf port by September 22, 1948, the last day on which one of the

buyer's import licenses was valid. The 1,490 tons in controversy were loaded abroad the S.S. Hawaiian in New Orleans by September 2, and the documents of title were delivered to the buyer's New York bank on September 7. But on September 3 the ship's crew went on strike, and the vessel did not leave New Orleans until some three months later. The Indian buyers brought this action, based on the diverse citizenship of the parties, against the shipper, the carrier, and the vessel owner to recover damages for loss of market caused by the late delivery; and the chief question on appeal is whether Colorado breached its contract. The district court found no breach. We agree with its conclusion and accept its findings of fact.

The United States District Court for the Northern District of California on June 14, 1948, temporarily restrained, and later enjoined, a threatened maritime strike of the East, Gulf, and West Coasts, under the national emergency provisions of the Labor Management Relations Act of 1947, 29 U. S. C. §141, *et seq.* The injunction was to expire at midnight September 2 at the end of an 80-day cooling-off period. During the summer, settlement negotiations were conducted; and the maritime industry was sufficiently optimistic as to the prospects of settlement that New York and New Orleans freight forwarders continued to book freight for September sailings. Colorado's New Orleans freight forwarder entered into an affreightment contract with Isbrandtsen Company, Inc., July 29, 1948, whereby Isbrandtsen was to transport 1,000 tons of canstic soda from New Orleans to Bombay on the S.S. Jane G. Swisshelm or other A-1 vessel, the scheduled sailing date being August 28-30, 1948. Shipping companies were reluctant to handle caustic soda, and Isbrandtsen was the only carrier found by the freight forwarder willing or able to undertake shipment.

Under the contract of affreightment shipside delivery was required between August 19 and 25. On August 17, Isbrandtsen exercised its right to substitute the S.S. Ha-

waiian, an A-1 vessel, for the S.S. Jane G. Swisshelm, with latest shipside delivery September 2, 1948. Upon receipt of this advice Colorado had the tonnage covered by the contract increased from 1,000 to 1,500 tons. Becker, secretary-treasurer of the New Orleans freight forwarder, testified that on or about August 18 he learned that the Gulf and East Coast disputes had been settled; and he had formed the opinion that there would be no strike at New Orleans. He did not know that the substituted vessel had a West Coast crew, since he was not advised by the carrier's agent and made no inquiry of his own; it was not the custom or practice of the port to do so. Becker testified further that he dealt with Isbrandtsen, which he considered reliable, and not with the persons from whom Isbrandtsen chartered ships. Consequently he did not know whether the S.S. Hawaiian was under time or bareboat charter or the identity of its owner.

Loading began at 1:00 P. M., August 31, within an hour after the ship docked at Westwego Wharf, and continued overtime. On September 2, at 3:00 P. M., while the injunction was still in effect, the stewards left the ship to attend a union meeting, but did not strike. Three hours later the last of the caustic soda was on board and the ship was loading other cargo. At midnight the injunction expired. At 3:15 A. M. the stewards went on strike, the first the ship's master knew that any of his crew would walk off. At 10:00 that morning the engine-room crew joined the strike, cutting off the steam to the winches and ending further loading operations. While the strike continued it was impossible to do anything with respect to loading or unloading the cargo or sailing from port.

The seller's freight forwarders, not knowing of the work stoppage, paid the freight at 9:30 A. M., September 3, receiving two bills of lading which they mailed to Colorado that day, a Friday. On the Tuesday after Labor Day, September 7, the bills were presented to the bank in New

York for payment. Becker learned of the strike in the early afternoon of September 3, but did not inform Colorado of it until September 7 because "the situation was very unclear on September 3rd • • •. It was a temporary situation and we were trying to see how it would progress, and then • • • there was a long week end occasioned by the Labor Day holiday." 138 F. Supp. 595, 604. Colorado's general traffic manager was surprised by Becker's wire late September 7 or September 8, and his assistant wrote for an explanation. Colorado learned the full story on September 13 and informed the buyer of the facts one week later.

There is no dispute that delivery of the bills of lading on September 7 was timely. But the seller in such circumstances is also obligated to the buyer to put the goods aboard a vessel "in good faith • • • having reason to suppose she would sail within a reasonable time after shipment." *Ledon v. Havemeyer*, 121 N. Y. 179, 186, 24 N. E. 297. "Shipment" occurred on September 2 when the caustic soda was loaded on board; what constitutes a reasonable delay before sailing depends on the particular contract of sale. *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13. Since documents of title could be presented as late as September 22, shipment on September 22 would not be improper; and it is to be expected that a vessel will take additional time to load other cargo if the shipper is not supplying a whole cargo. *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297. Thus the buyer would certainly have had no complaint had the S.S. Hawaiian sailed September 23. From the exchange of cables and letters which constituted the contract of sale it appeared that part of the goods could be put on board as late as October 9, suggesting that the buyer fixed the September 22 deadline because that was the expiration date of its import license, and not because it feared an immediate market drop. From all this Colorado could properly assume that

the buyer would be satisfied with a September 23 sailing, and would accept an October 11 sailing if necessary.

Even if we ascribe to the seller knowledge that the ship had a West Coast crew, the seller could nevertheless reasonably entertain the belief in good faith at the time of loading that the vessel would depart by the second week in October. The duty defined in *Ledon v. Havemeyer, supra*, 121 N. Y. 179, 24 N. E. 297, was accordingly satisfied. Moreover, Colorado, as we see it, did everything to speed the goods on their way that the buyer could have done had the latter been on the spot and representing its own interests.

The contract with Isbrandtsen made on July 29 was as good a contract as could be had at the time. There was no reason then to be suspicious of a possible substitution of another A-1 vessel. When on August 17 Colorado confirmed the substitution of the S.S. Hawaiian there was still no reason to reject a ship because it had a West Coast crew; the East Coast and Gulf settlements were still in the future, and one crew seemed no more likely to strike than another. Later when it appeared that West Coast crews were less desirable than others, there was no alternative course open which promised more likelihood of prompt sailing. If Colorado broke its contract to use the S.S. Hawaiian and sought another ship with a Gulf or East Coast crew, there was virtually no chance of obtaining space promptly. There was evidence that it takes considerable time to book space for a cargo of that size and that other lines were unwilling to handle caustic soda. Refusing to load until the strike situation was clear involved the same disadvantages. It made far better sense to take a chance that the S.S. Hawaiian would not be struck or would be struck briefly. While it was foreseeable that there would be a strike, it was far less foreseeable that a maritime strike crippling the entire West Coast would last from September 2 past the first week in October; and in

the circumstances it was an intelligent business decision to load aboard the S.S. Hawaiian.

The plaintiffs' other major argument concerns Colorado's presentation of the bills of lading to the buyer's bank after the strike occurred. Plaintiffs cite a dictum in *Ocean S. S. Co. v. U. S. Steel Products Co.*, 2 Cir., 239 F. 823, 826, certiorari denied 244 U. S. 652, for the proposition that this constituted fraud. See also 49 U. S. C. §114(c), which states that one negotiating a bill of lading warrants "That he has knowledge of no fact which would impair the • • • worth of the bill." Assuming that the worth of the bills of lading was impaired by the strike, a fact which was not established below, it was still necessary to prove that Colorado did know of the strike at the time it negotiated the bills. Plaintiffs would have us impute the knowledge of Becker, secretary-treasurer of the freight-forwarding corporation, to Colorado, for it was shown that Becker learned of the strike late on September 3, four days before Colorado presented the documents of title. But Becker was under no duty to keep Colorado informed of strike developments, and consequently his knowledge cannot be imputed to Colorado. 1 Restatement, Agency §275 (1933). Becker's original deposition indicated that he kept abreast of strike developments and notified shippers if they materialized, but at trial he insisted that his duty to shippers ended when he delivered bills of lading. The trial court accepted his later version, and we cannot say that this finding was clearly erroneous.

Inasmuch as Colorado conducted its freight forwarding through an independent contractor whose reliability is not questioned, and only two vessels in the whole port of New Orleans were affected by the West Coast strike, it cannot properly be charged with constructive notice of the strike before the time Becker cabled the news on September 7. Moreover, we think actual, rather than constructive, knowledge is required in such circumstances. *Fenold v. Green*,

2 Cir., 175 F. 2d 247; *Bank of Otterville v. Bank of Booneville*, 223 Mo. App. 572, 16 S. W. 2d 702.

Plaintiffs also named as defendants Isbrandtsen and the owner of the S.S. Hawaiian; but the claims against them, if any, are barred by the one-year statute of limitations in the Carriage of Goods by Sea Act, 46 U. S. C. §1303(6). *Commercio Transito Internazionale, Ltd., v. Lykes Bros. S. S. Co.*, 2 Cir., April 29, 1957.

In their briefs the plaintiffs treat the present case as one in which a seller fails to perform and then attempts to establish the defense of impossibility. In such cases the seller has the burden of proving the defense, which often amounts to establishing that the catastrophe which prevented performance was not foreseeable, e. g., *L. N. Jackson & Co. v. Royal Norwegian Government*, 2 Cir., 177 F. 2d 694, certiorari denied 339 U. S. 914. Here, however, the plaintiffs failed to satisfy the trial court that the seller breached its contract; consequently it was never necessary for the seller to establish the impossibility of its performing.

Affirmed.

HAND, Circuit Judge (dissenting):

We should distinguish between a failure to deliver the cargo at all, and a failure to make timely delivery (in this case on board a ship, September 22). The seller did indeed make delivery under §127(1) of the New York Personal Property Law and at common law, by laying the cargo alongside the ship, and it is also true that this delivery was in season to conform to the date fixed in the contract which was September 22. Nevertheless, it was not such a delivery as the parties contemplated because the ship did not break ground on or about September 22; hence it was not the stipulated performance. If the strike had arisen unexpectedly after the contract of sale was

made, perhaps it would have excused the defendant's failure to perform; but, at the time, the situation was such that a West Coast strike might well be resumed after September 1 when the injunction expired; and, that being true, the defendant took the risk that it would be unable to perform. *Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (C. A. 2). Compare *L. N. Jackson & Co. v. Royal Norwegian Government*, 177 F. 2d 694 (C. A. 2). If a seller makes a "reasonable" contract with the carrier "on behalf of the buyer," that the ship will break ground on the stipulated day I will assume that under §127(2) this would be performance, though she does not do so. However, in the case at bar it was not "reasonable" to assume that the ship selected would be free to break ground on September 22; she might or she might not; no one could tell. That was not enough to absolve the defendant from the implied agreement that it would select a ship, free on September 22. It was fully charged with notice that the ship was from the West Coast and that the strike on that coast had not been settled. It had deputed Becker to select the ship, and Becker had left its selection altogether to Isbrandtsen, an irresponsible subinfeudation of authority. Even a casual inquiry as to whether the ship selected was within the still strike-bound zone, would have disclosed the risk imposed on the plaintiff.

Incidentally Judge Ryan's conclusion that the contract was "reasonable" is not a "finding of fact," reversible only if it is "clearly erroneous"; in a case tried to a judge it is a "conclusion of law."*

I would reverse the judgment and remand to ascertain the damages arising from the delay.

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* *Barbarino v. Stanhope S.S. Co.*, 151 F. 2d 553 (C. A. 2); *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 159 F. 2d 661; *Kreste v. United States*, 158 F. 2d 575, 577; *Guerrini v. United States*, 167 F. 2d 352, 355 (C. A. 2); *Johnson v. United States*, 168 F. 2d 886 (C. A. 2); *Lynch v. Agwilines, Inc.*, 184 F. 2d 826, 828 (C. A. 2); *Bonnewell v. United States*, 170 F. 2d 411, 412 (C. A. 4); *Dale v. Rosenfeld*, 229 F. 2d 855, 858 (C. A. 2).

APPENDIX B.

UNITED STATES COURT OF APPEALS,

For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of May one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,
Chief Judge,

Hon. Learned Hand,
Hon. J. Edward Lumbard,
Circuit Judges.

R. S. Dass Badhwahr, *et al.*, Plaintiffs-Appellants, v. Amr.-Hawaiian S.S. Corporation, Defendant-Appellant, Colorado Fuel & Iron Corporation, *et al.*, Defendants-Appellees.	Civ. 62-10

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO
Clerk

A true copy.

A. Daniel Fusaro
Clerk.
(Seal)

APPENDIX C.

Statutes Involved.

Sections 209 and 210 of the Labor Management Relations Act of 1947, 61 Stat. §§155, 156, 20 U. S. C. §§179, 180, read as follows:

"179. (a) Whenever a district court has issued an order under section 178 of this title enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

180. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

Section 4 of the United States Carriage of Goods by Sea Act, 49 Stat. 1210, 46 U. S. C. 1304, reads in part as follows:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

• • • • • •

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"

Section 114 of 49 U. S. Code, part of a chapter headed "Bills of Lading," reads as follows, in part:

"A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) • • •

Section 127 of the New York Personal Property Law reads as follows:

"1. Where in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit."

Section one hundred, Rule 5, referred to in Section 127 (1), reads as follows:

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."